

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 12 2008

MOLLY DWYER, ACTING CLERK
U.S. COURT OF APPEALS

BENJAMIN MARTINEZ-GARCIA,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 06-70530

Agency No. A91-854-769

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted February 26, 2008^{**}

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

Benjamin Martinez-Garcia, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order summarily affirming an immigration judge's ("IJ") decision pretermittting his application for cancellation

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review the agency's continuous physical presence determination for substantial evidence. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006). We review de novo claims of constitutional violations in immigration proceedings. *See Ram v. INS*, 243 F.3d 510, 516 (9th Cir. 2001). We review for abuse of discretion the denial of a motion to continue. *Barapind v. Reno*, 225 F.3d 1100, 1113 (9th Cir. 2000). We deny the petition for review.

Substantial evidence supports the agency's determination that Martinez-Garcia did not meet the continuous physical presence requirement where the record shows he departed the United States on October 19, 1998 and returned on February 12, 1999. *See* 8 U.S.C. § 1229b(d)(2) (departure of greater than 90 days breaks continuous physical presence).

Martinez-Garcia contends the IJ violated due process by declining to hear him testify about his departure to Mexico. However, Martinez-Garcia made no showing that the absence of this testimony may have affected the outcome of the proceedings. *See Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (requiring prejudice to prevail on a due process challenge).

The IJ did not abuse his discretion in denying a continuance where Martinez-Garcia did not demonstrate good cause. *See* 8 C.F.R. § 1003.29 (an

immigration judge may grant a motion for continuance for good cause shown).

PETITION FOR REVIEW DENIED.